

23.1	Applicable Court Rule and Legislative Sentencing Guidelines	469
23.2	Required Credit for Time Spent in Custody Prior to Sentencing	471
23.3	Cruel or Unusual Punishment.....	472
23.4	Alternative Sentences for Major Controlled Substances Offenses.....	472

In this chapter. . .

This chapter discusses selected issues surrounding imposition of adult sentences upon juveniles. It does not contain discussion of the procedural or substantive requirements for criminal sentences.

For discussion of the requirements for challenging the use of a prior adjudication or conviction due to a juvenile's lack of counsel, see Section 25.7.

Note on court rules. On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and “traditional waiver” proceedings, and to Subchapter 6.900, which govern “automatic waiver” proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJJ, 1998).

23.1 Applicable Court Rule and Legislative Sentencing Guidelines

MCR 6.425 contains the applicable procedural rules for criminal sentencing hearings. MCR 6.425 governs sentencing hearings in “traditional waiver,” “automatic waiver,” and designated case proceedings. Discussion of this court rule is beyond the scope of this benchbook.

The statutory Sentencing Guidelines, mandated by 1998 PA 317, MCL 777.1 et seq., are applicable to felonies committed on or after January 1, 1999. A sentencing court must impose a minimum sentence within the appropriate sentence range, unless there is a “substantial and compelling reason” to depart from the Guidelines. MCL 769.34(3). “Substantial and

compelling” reasons only exist in exceptional cases, and those reasons should irresistibly grab the court’s attention and have considerable worth in determining the length of sentence. *People v Babcock (Babcock I)*, 244 Mich App 64, 75 (2000). Only “objective and verifiable” factors may be used to assess whether there are “substantial and compelling” reasons to depart from the appropriate guideline range. *Id.* A sentencing court must articulate its reasons for departure on the record. *People v Bennett*, 241 Mich App 511 (2000), citing *People v Fleming*, 428 Mich 408, 428 (1987).

A sentencing court must also “specifically articulate the reasons why the factors it identifies and relies upon collectively provide ‘substantial and compelling’ reasons to except the case from the legislatively mandated regime.” *People v Johnson (On Remand)*, 223 Mich App 170, 173–74 (1997). Factors used in scoring the guidelines cannot be used as “objective or verifiable” factors unless the trial court finds “from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b).

The principle of proportionality applies when determining the extent of a departure from the recommended Guideline range. See *People v Hegwood*, 465 Mich 432, 437 n 10 (2001), which modified the holding in *Babcock I*, *supra*, as follows:

“The Court of Appeals indicated in *Babcock* that the principle of proportionality is not part of the legislative guidelines, and that there will be no appellate review of sentence length in cases in which there is a substantial and compelling reason to depart from the recommended minimum stated in the legislative guidelines. . . . In this regard, however, we observe that the statute provides, ‘A court may depart from the appropriate sentence range established under the [guidelines] if the court has a substantial and compelling reason for that departure’ (Emphasis supplied.) MCL 769.34(3). In light of such language, we do not believe that the Legislature intended, in every case in which a minimal upward or downward departure is justified by ‘substantial and compelling’ circumstances, to allow unreviewable discretion to depart as far below or as far above the guideline range as the sentencing court chooses. Rather, the ‘substantial and compelling’ circumstances articulated by the court must justify the *particular* departure in a case, i.e., ‘that departure.’” [Emphasis in original.]

See also *People v Babcock (Babcock II)*, 250 Mich App 463, 468-469 (2002) (“*Hegwood* indicates that the principle of proportionality can be considered concerning the extent of a departure.”)

For sentencing requirements involving “intermediate sanction” ranges under the Guidelines, see *People v Stauffer*, 465 Mich 633 (2002) (if the recommended minimum range under the “intermediate sanction” statute is 18 months or less, a trial court cannot sentence a defendant to prison, unless it gives “substantial and compelling” reasons).

*MCL 771.1(d)
and MCL
769.31(c).

23.2 Required Credit for Time Spent in Custody Prior to Sentencing

MCR 6.425(D)(2) and MCR 6.445(G) require that the sentencing court grant credit for time served to which a defendant is entitled. The following statutes and court rules mandate such credits in proceedings involving juveniles:

- If sentencing is not delayed in a designated case proceeding, the juvenile is entitled to credit for “time served” before sentencing. MCL 712A.18(1)(n).
- If sentencing is delayed in a designated case proceeding, the juvenile is entitled to credit “for the period of time served on probation” before sentencing. MCL 712A.18i(11). See also MCR 3.956(A)(5) and 3.956(B)(4), both of which also mandate credit “for the time served on probation” when sentencing is delayed in a designated case proceeding.
- MCL 769.1b(7), dealing with “automatically” waived juveniles, provides that the juvenile must receive credit for the period of time served on probation and committed to a state agency or institution. Similarly, MCL 771.7(1) states that following revocation of probation for commission of a felony, “[t]he court shall grant credit against the sentence for the period of time the juvenile served on probation.” See *People v Cokley*, unpublished opinion per curiam of the Court of Appeals, decided January 9, 1995 (Docket No. 156947) (the plain language of MCL 771.7(1) required credit for the entire period that the juvenile was on probation, including the time he was living at home with his grandparents. MCR 6.938(E) contains language substantially similar to MCL 771.7(1).

In addition, there are several other statutory provisions that mandate credit for time served for all criminal defendants. A criminal defendant must be granted credit for:

- time spent in jail due to inability to post bond, MCL 769.11b;
- time spent in a juvenile facility prior to sentencing because of being denied or unable to furnish bond, MCL 764.27a(5); see also *People v Thomas*, 58 Mich App 9, 10–11 (1975);

*For discussion of a case in which a juvenile commitment was held to be void, see Section 21.7.

- time spent in custody during competency evaluations and treatment, MCL 330.2042; see also *People v Gravlin*, 52 Mich App 467, 469 (1974); and
- time spent in jail or prison on a void sentence that is set aside: time must be credited against a new sentence imposed for a conviction “based upon facts arising out of the earlier void conviction,” MCL 769.11a.*

Sentence credit under MCL 769.11b must be limited to jail time served for the offense of which the defendant is convicted. A defendant is not entitled to credit for time served on unrelated charges committed while out on bond. *People v Prieskorn*, 424 Mich 327, 340 (1985).

23.3 Cruel or Unusual Punishment

In *People v Launsbury*, 217 Mich App 358, 363–65 (1996), the Court of Appeals held that imposing a mandatory life sentence without parole on a juvenile convicted of first-degree felony murder does not constitute cruel or unusual punishment under the Michigan Constitution. In *Launsbury*, the Court noted that to determine whether a punishment is “cruel or unusual,” several factors must be analyzed, including the goal of rehabilitation. *Id.* at 363, citing *People v Bullock*, 440 Mich 15 (1992). The Court in *Launsbury* noted that MCL 769.1(3) required a sentencing court to consider a juvenile’s prospects for rehabilitation at a juvenile sentencing hearing. *Id.* at 364. *Launsbury* was decided prior to the effective date of statutory amendments that require adult sentencing for juveniles convicted of first-degree murder following “automatic waiver” proceedings. See 1996 PA 247–248. No published case has addressed a “cruel or unusual punishment” challenge under the amended statute. See, however, *People v Fernandez*, 427 Mich 321, 339 (1986) (the goal of rehabilitation is not a consideration where the sentence is mandatory, non-parolable life imprisonment). See also *Foster v Withrow*, 159 F Supp 2d 629, 643–46 (ED Mich, 2001) (a sentence of non-parolable life imprisonment for first-degree murder imposed upon a juvenile does not violate the United States Constitution’s prohibition of “cruel and unusual punishment”).

23.4 Alternative Sentences for Major Controlled Substance Offenses

Possession of 650 grams or more. MCL 769.1(5) and MCL 769.1(12) provide that if an individual under the circuit court’s jurisdiction in an “automatic waiver” or “traditional waiver” proceeding is convicted of a violation or conspiracy to commit a violation of MCL 333.7403(2)(a)(i) (possession of 650 grams or more of a Schedule 1 or 2 narcotic or cocaine), the court must determine whether the best interests of the public would be served by:

- imposing the sentence provided by law for an adult offender (mandatory life imprisonment*), or
- imposing a sentence of imprisonment for any term of years but not less than 25 years if the court determines by clear and convincing evidence that such a sentence would serve the best interests of the public.

In making this determination, the court shall use the same criteria as listed in MCL 769.1(3). MCL 769.1(5).*

In designated case proceedings, if the juvenile is convicted of a violation or a conspiracy to commit a violation of MCL 333.7403(2)(a)(i), the court may impose the alternative sentence permitted under that section if the court determines that the best interests of the public would be served. MCL 712A.18(1)(n). The alternative sentence permitted under MCL 333.7403(2)(a)(i) is a term of years not less than 25 years rather than mandatory life in prison. MCL 333.7403(2)(a)(i)(B). Unlike MCL 769.1(5), however, MCL 712A.18(1)(n) and MCL 333.7403(2)(a)(i)(B) do not specify the criteria to apply or require the “clear and convincing evidence” standard when deciding whether to impose the alternative sentence.

Legislation effective March 1, 2003. 2002 PA 665, effective March 1, 2003, eliminated the mandatory penalty under MCL 333.7403(2)(a)(i). That statute now provides that a person convicted of possession of 1000 grams or more of a Schedule 1 or 2 narcotic or cocaine may be sentenced to prison for life or any term of years, a fine of not more than \$1,000,000.00, or both. 2002 PA 665 also deleted the alternative sentence of any term of years but not less than 25 years for juveniles convicted in “automatic waiver,” “traditional waiver,” or designated case proceedings. See 2002 PA 665, eliminating MCL 333.7403(2)(a)(i)(A)–(B).

Possession or delivery of less than 650 grams. If a juvenile is convicted of a violation of MCL 333.7401(2)(a)(ii)–(iv) or MCL 333.7403(2)(a)(ii)–(iv), the court may depart from the mandatory minimum terms listed below if the juvenile has not previously been convicted* of a felony or an assaultive crime, and has not been convicted of another felony or assaultive crime arising from the same transaction as the controlled substance violation. MCL 333.7401(4) and MCL 333.7403(3).

The controlled substance offenses covered by this alternative sentencing provision and their mandatory minimum terms are as follows:

*A defendant is eligible for parole under MCL 791.234(6) and (10).

*See Section 21.4 for a list of these criteria.

*Prior juvenile adjudications do not qualify.

- Manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver the following amounts of a Schedule 1 or 2 narcotic drug or cocaine:
 - 225 grams or more, but less than 650 grams. Not less than 20 years nor more than 30 years. MCL 333.7401(2)(a)(ii).
 - 50 grams or more, but less than 225 grams. Not less than 10 years nor more than 20 years. MCL 333.7401(2)(a)(iii).
 - Less than 50 grams. Not less than 1 year nor more than 20 years, and may be fined not more than \$25,000.00, *or* placed on probation for life. MCL 333.7401(2)(a)(iv).
- Possession of the following amounts of a Schedule 1 or 2 narcotic drug or cocaine:
 - 225 grams or more, but less than 650 grams. Not less than 20 years nor more than 30 years. MCL 333.7403(2)(a)(ii).
 - 50 grams or more, but less than 225 grams. Not less than 10 years nor more than 20 years. MCL 333.7403(2)(a)(iii).
 - 25 grams or more, but less than 50 grams. Not less than 1 year nor more than 4 years, and may be fined not more than \$25,000.00, *or* placed on probation for life. MCL 333.7403(2)(a)(iv).

It does not appear that the court also needs “substantial and compelling reasons” to depart from the mandatory minimum sentences listed above. See MCL 333.7401(4) and MCL 333.7403(3). See also *Managing a Trial Under the Controlled Substances Act* (MJI, 1995), Section 15.6, for a discussion of what constitutes “substantial and compelling reasons” under these statutes.

“Assaultive crime” means any of the following offenses:

- assault and battery, MCL 750.81;
- assault, infliction of serious injury, MCL 750.81a;
- felonious assault, MCL 750.82;
- assault with intent to murder, MCL 750.83;
- assault with intent to do great bodily harm less than murder, MCL 750.84;
- assault with intent to maim, MCL 750.86;
- assault with intent to commit a felony, MCL 750.87;
- assault with intent to rob while unarmed, MCL 750.88;

- assault with intent to rob while armed, MCL 750.89; or
- sexual intercourse under pretext of medical treatment, MCL 750.90.

MCL 333.7401(5)(a) and MCL 333.7403(4).

Legislation effective March 1, 2003. 2002 PA 665, 666, and 670, effective March 1, 2003, deleted MCL 333.7401(4) and MCL 333.7403(3), eliminated mandatory minimum sentences under prior law, changed the amounts and penalties applicable to controlled substance offenses, and made persons convicted under prior law eligible for parole under certain circumstances. Thus, after March 1, 2003, a sentencing court need not depart from a mandatory minimum sentence as under prior law. Persons convicted on or after March 1, 2003, are subject to the following penalties:

- Manufacture, creation, delivery, or possession with intent to manufacture, create, or deliver the following amounts of a Schedule 1 or 2 narcotic drug or cocaine:
 - 450 grams or more, but less than 1000 grams. Punishable by imprisonment for not more than 30 years, a fine of not more than \$500,000.00, or both. MCL 333.7401(2)(a)(ii).
 - 50 grams or more, but less than 450 grams. Punishable by imprisonment for not more than 20 years, a fine of not more than \$250,000.00, or both. MCL 333.7401(2)(a)(iii).
 - Less than 50 grams. Punishable by imprisonment for not more than 20 years, a fine of not more than \$25,000.00, or both. MCL 333.7401(2)(a)(iv).
- Possession of the following amounts of a Schedule 1 or 2 narcotic drug or cocaine:
 - 450 grams or more, but less than 1000 grams. Punishable by imprisonment for not more than 30 years, a fine of not more than \$500,000.00, or both. MCL 333.7403(2)(a)(ii).
 - 50 grams or more, but less than 450 grams. Punishable by imprisonment for not more than 20 years, a fine of not more than \$250,000.00, or both. MCL 333.7403(2)(a)(iii).
 - 25 grams or more, but less than 50 grams. Punishable by imprisonment for not more than 4 years, a fine of not more than \$25,000.00, or both. MCL 333.7403(2)(a)(iv).*

As noted above, under MCL 333.7401(2)(a)(iv) and MCL 333.7403(2)(a)(iv) prior to March 1, 2003, the court had authority to place a defendant on probation for life. MCL 333.7401(4) now states as follows:

*See also §(2)(a)(v): possession of less than 25 grams punishable by imprisonment for not more than four years and/or \$25,000.

“(4) If an individual was sentenced to lifetime probation under subsection (2)(a)(iv) before the effective date of the amendatory act that added this subsection and the individual has served 5 or more years of that probationary period, the probation officer for that individual may recommend to the court that the court discharge the individual from probation. If an individual’s probation officer does not recommend discharge as provided in this subsection, with notice to the prosecutor, the individual may petition the court seeking resentencing under the court rules. The court may discharge an individual from probation as provided in this subsection. An individual may file more than 1 motion seeking resentencing under this subsection.”

MCL 333.7403(3) contains substantially similar language applicable to persons sentenced under MCL 333.7403(2)(a)(iv) prior to March 1, 2003.

Conditional sentencing under MCL 333.7411. For a limited number of controlled substances offenses, a provision of the Controlled Substances Act, MCL 333.7411, authorizes a judge to place a defendant on probation then dismiss the case if the defendant fulfills the probation conditions. The defendant must consent to use of §7411, but prosecuting attorney consent is not required. Under MCL 333.7411(1), a defendant may be sentenced to probation under §7411 if he or she:

- has no prior controlled substances convictions and is charged with possession of a controlled substance pursuant to MCL 333.7403(2)(a)(v) or (2)(b)–(d);
- has no prior controlled substances convictions and is charged with use of a controlled substance pursuant to MCL 333.7404; or
- has been convicted of either a first or second violation of possession of an imitation controlled substance pursuant to MCL 333.7341.

Probation conditions may include conditions stated in MCL 771.3, jail time, and residential or non-residential treatment programs.*

*For a more detailed discussion of this statute, see *Managing a Trial Under the Controlled Substances Act* (MJI, 1995), Section 15.7.